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THE FRENCH SPOILIATION CLAIMS

From time to time the cases known by the generic name of French Spoliation Claims come up for discussion in Congress and in the press and are often debated without any very definite conception of their origin or basis. It may seem strange that claims against the government whose inception is connected with the very beginning of our national existence should still be the subject of consideration as present demands against the government, both before the courts and in the legislative forum.

But dilatoriness in dealing with matters of private right between the citizen and the government seems to have become traditional. Not until 1885 was there any tribunal before which these claims could be prosecuted. Even under the Act of 1885, as will be seen hereafter, a decision of the court has not the legal effect of a final judgment. Hence, it is that the liability of the government for the payment of these claims settled by unanimous judicial decision a quarter of a century ago is often reopened in Congress and the press and the subject threshed out anew, often in apparent ignorance of the laborious investigation long since made by the Court of Claims into the history and basis of these claims, and the result of that investigation as announced in a number of thorough and well-reasoned opinions.

The origin of these claims is closely intertwined with the stirring events of our struggle for independent national existence. At its darkest hour the astute diplomacy of Franklin and his colleagues convinced the generous and high-minded young King Louis XVI and his counsellors that it would be to the interest of France to enter into an alliance with us. Vergennes and the other ministers of the King clearly saw that we had a great future before us and decided that our friendship was of importance. This view led to our recognition as a government by France, first among all nations, and to the conclusion of two treaties with that country made together and constituting in

diplomatic effect one instrument, the first by many years of all the treaties entered into by the United States.

By the 11th article of the "Treaty of Alliance between the United States of North America and His Most Christian Majesty, Concluded at Paris February 6, 1778, Ratified by Congress May 4, 1778," the following momentous guaranty was given by each party to the other:¹

Article XI. The two parties guarantee mutually from the present time and forever against all other powers, to wit:

The United States to His Most Christian Majesty, the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace;

And His Most Christian Majesty guarantees on his part to the United States their liberty, sovereignty, and independence, absolute and unlimited, as well in matters of government as commerce, and also their possessions, and the additions or conquests that their confederation may obtain during the war, from any of the dominions now, or heretofore possessed by Great Britain in North America, conformable to the 5th and 6th articles above written, the whole as their possessions shall be fixed and assured to the said States, at the moment of the cessation of their present war with England.

The guaranty thus given by France to us was essential to our national existence. We were in the midst of a contest for independence — a contest the issue of which was then very doubtful. The act of France in recognizing the separate national existence of revolted British colonies constituted in effect a declaration of war against Great Britain, and as such was fully acted upon by both nations.

The guaranty of our independence here made by France was carried out in the fullest manner. She supplied us with troops and munitions of war most fully and generously and made us large loans in money. Her aid was important, if not indispensable, to our success in gaining our independence.

Our next treaty with her, made in 1782, when the struggle had been practically decided in our favor, is entitled "Contract between His Most Christian Majesty, and the Thirteen United States of North America, relative to payment of loan," etc. It begins:²

¹ Public Treaties of the United States, 1875, pp. 202, 203.

² Public Treaties of the United States, 1875, p. 214.

The King having been pleased to attend to the requests made to him in the name and on behalf of the United Provinces of North America, for assistance in the war and invasion under which they had for several years groaned; and His Majesty, after entering into a treaty of amity and commerce with the said Confederated Provinces, on the 6th of February, 1778, having had the goodness to support them, not only with his forces by land and sea, but also with advances of money, as abundant as they were effectual, in the critical situation to which their affairs were reduced: it has been judged proper and necessary to state exactly the amount of those advances, etc.

The treaty then proceeds to show that these loans amounted to eighteen million livres, money of France, which by that treaty the United States agreed to repay in stipulated installments with interest at five per cent. from the date of the treaty of peace, not yet then concluded. The King as ³ —

a new proof of his affection and friendship, has been pleased to make a present of, and to forgive the whole arrears of interest to this day, and from thence to the date of the treaty of peace; a favor which the Minister of the Congress of the United States acknowledges to flow from the pure bounty of the King, and which he accepts in the name of the said United States with profound and lively acknowledgments.

The guaranty which we, on the other hand, gave to France was of no less importance. Her present possessions, which we guaranteed to her forever, were very extensive and valuable — the islands of Santo Domingo, Martinique, Guadeloupe, St. Lucia, St. Vincent, Tobago, Descada, Marie-Galante, and Granada in the West Indies, a colony on the mainland at Cayenne, and the islands of St. Pierre and Miquelon on the coast of Newfoundland.

This treaty also authorized all ships of war and privateers of either party to carry their prizes freely into the ports of the other without any examination concerning the lawfulness of the prize. The privilege was furthermore made exclusive. “No shelter or refuge shall be given in their ports to such as shall have made prize of the subjects, people or property of either of the parties.” ⁴

Our national independence was secured with the aid of France

³ Public Treaties of the United States, 1875, p. 215.

⁴ Public Treaties of the United States, 1875, article 17, pp. 208, 209.

and was in 1783 finally acknowledged in the fullest manner by our former sovereign, King George III. If France had expected any special commercial relations to spring up as a consequence of her alliance with us, the expectation seems to have been disappointed. Trade and commerce tended to revert to their old channels.

In 1789 the French Revolution broke out. The monarchy came to an end and King Louis XVI, our good friend of fifteen years earlier, was executed in 1793. War broke out between France and Great Britain with whom were allied nearly all the other nations of Europe.

It then became of vital importance for France that we should take sides with her and make good the perpetual guaranty which we had given her of her American possessions, as well as allow her the exclusive privileges in relation to her prizes secured to her by the treaty of 1778. There was no national sentiment in favor of doing any of these things. On the contrary, we entered into the most friendly relations with our former enemy, Great Britain.

John Jay was sent as envoy to that country with instructions to conclude a treaty. We had our own grievances against that country, as will be seen later. Jay was instructed not to let these grievances stand in the way of the conclusion of a treaty. The result was the British treaty of 1794. It was therein provided in direct contravention of our agreement of 1778 with France:

It shall be lawful for the ships of war and privateers belonging to the said parties respectively to carry whithersoever they please the ships and goods taken from their enemies, without being obliged to pay any fee to the officers of the admiralty, or to any judges whatever; nor shall the said prizes, when they arrive at and enter the ports of the said parties, be detained or seized, neither shall the searchers or other officers of those places visit such prizes (except for the purpose of preventing the carrying of any part of the cargo thereof on shore in any manner contrary to the established laws of revenue, navigation, or commerce), nor shall such officers take cognizance of the validity of such prizes; but they shall be at liberty to hoist sail and depart as speedily as may be, and carry their said prizes to the place mentioned in their commissions or patents, which the commanders of the said ships of war or privateers shall be obliged to show.⁵

⁵ *Public Treaties of the United States*, 1875, article XXV, p. 280.

This privilege was again made exclusive by the provision, "No shelter or refuge shall be given in their ports to such as have made a prize upon the subjects or citizens of either of the said parties."

So direct was the conflict between this provision and the equally exclusive one of the French treaty of sixteen years earlier that it seems a touch of sarcasm when it is added later down in the same article:

Nothing in this treaty contained shall, however, be construed or operate contrary to former and existing public treaties with other sovereigns or States.

The ties of mutual self-interest between ourselves and Great Britain reasserted themselves as soon as the political difficulties between us were disposed of by our separation from that country. It is not necessary to criticise the international morality of our statesmen of that day when we confess that France had a well-founded grievance against us. When we refused to abide by our guaranty to France of the continued possession of her American colonies, when we took away from her the exclusive port privileges secured to her by treaty, and when we made the Jay treaty of 1794 with Great Britain, we committed a flagrant breach of our plighted faith for which she might well call upon us to make reparation.

Great Britain, being the almost undisputed mistress of the seas, took from France in little more than a month all of her possessions in the West Indies, without our lifting a finger to defend them as we were required to do by the treaty of 1778 "from the present time and forever against all other Powers."

The contest between France and Great Britain reached such a degree of bitterness that neutral rights were trampled under foot by both parties. Each aimed to deprive the other of all benefit of neutral trade. Captures were not limited to enemies' property, to contraband of war or to vessels destined to blockaded ports. Each virtually prohibited all trade with the opposite belligerent. Vessels and other cargoes in peaceful pursuit of lawful trade on the high seas were captured by both without any regard to international law.

The action of France was further stimulated by her national and well-founded grievance against us, in that we had failed to maintain

our perpetual and solemn guaranty of her peaceable possession of her American colonies and had transferred her exclusive port privileges to her enemy. It was claimed, and probably with some truth, that the first seizures of American merchantmen and their cargoes on the high seas were made in mistake of nationality. Identity of language and similarity of appearance caused the French to mistake Americans for English, as they constantly do even at the present day when the differences between the two nations have become much more marked.

Generally these vessels and their cargoes were taken into ports of France or her colonies and were there condemned by tribunals exercising jurisdiction in prize. Sometimes they were merely seized and converted by the captors to their own use without any legal form of condemnation. Occasionally the cargo was removed from a vessel, the crew taken on board the capturing vessel and the captured vessel burned. In such cases the crew were set adrift at the convenience of the captors. Of course the captors in such cases did not take the trouble to secure any legal condemnation of either vessel or cargo. Sometimes the master and crew were kept in prison while their vessel was condemned, with no opportunity on their part to appear or make any showing in opposition to the proceedings of the captors. In any case, whether the proceedings took place in France or her colonies, they were in a strange land where the captured master and crew were ignorant of the language and laws, without money or friends and at the mercy of tribunals committed in advance to an adverse decision.

Many of these seizures were made by French public vessels of war, but a very large proportion by privateers commissioned by authority of the French Government. France had at that time a very small navy, and therefore commissioned a large number of privateers. Some of the grounds of condemnation were ludicrous. In one case one ground of condemnation was that the American flag carried by the prize vessel contained only fourteen stars instead of fifteen. In another case there was the ground, equally without force in law, but of more importance in the eyes of the French, that the vessel carried three English passengers. In most cases the ground of condemnation consisted in some trifling irregularity in the ship's papers, usually in

her *rôle d'équipage*, or, as it is sometimes termed not with entire accuracy, her crew list.

In the West Indies, and particularly in Guadeloupe, after the recapture of that island from the British, the judges of the prize tribunals not only acted with flagrant disregard of law and justice, but were stimulated to do so by motives of personal interest in the proceedings. The judges were themselves frequently part owners of the very privateers upon the legality of whose captures they pronounced, and participated in the fruits of their own decrees.

The spoliations committed upon our commerce by the other belligerents of the day in the prosecution of their arbitrary measures in disregard of neutral rights were long since settled and paid. Those against Great Britain were settled through a provision in the Jay treaty of 1794 constituting a joint claims commission. Under the action of this commission Great Britain paid in satisfaction of the claims of our citizens many millions of dollars. The spoliations thus committed by England were for the purpose of starving the French by depriving them of supplies being transported in our vessels to French ports, just as the spoliations committed by the French, forming the subject of the claims now under discussion, were largely for the counter purpose of feeding the French people.

Spain acted as an ally of France and many of the French prizes were condemned by French authorities exercising jurisdiction in prize within Spanish territory. Spain, by the treaty of 1819 ceding Florida, was in consideration of that cession released from the payment of all claims of this character for which she was responsible, and the United States agreed to make satisfaction for the claims of our own citizens against Spain. This obligation was fulfilled by our government; all claims against Spain were satisfied through the agency of a claims commission appointed under the authority of an Act of Congress; and its awards were promptly met and paid by appropriations from our treasury.

Thus of the three Powers which committed spoliations on our commerce during this period — Great Britain, France and Spain — France is the only one for whose spoliations no reparation has ever been made.

Against France our government at the time took measures as vigorous as the then feeble condition of our newly-formed nation permitted, and as prompt as was consistent with the slowness of communication existing between this country and the other side of the ocean.

One set of envoys after another was sent to France and, after being successively treated in a manner to humiliate both themselves and the nation which they represented, successively failed to secure any cessation of the injuries or promise of redress.

Congress in 1798 passed a number of measures of a defensive character in preparation for the breach, then regarded as imminent, of peaceful relations with France.

On May 28, 1798, was passed "An act more effectually to protect the Commerce and Coasts of the United States,"⁶ giving authority to the President to instruct commanders of the armed vessels of the United States to seize any armed vessel hovering about the coast of the United States for the purpose of committing depredations on American vessels, and also to retake any merchantmen which may have been captured by any such armed vessel.

On the 13th of June, 1798,⁷ commercial intercourse was suspended between the United States and France, but it was directed that if before the next session of Congress the French Government should disavow its depredations upon the vessels and other property of American citizens and thereby acknowledge the claim of the United States to be considered neutral in the existing European disputes, the President might remit and discontinue the prohibitions and restraints thereby declared.

June 25, 1798,⁸ merchant vessels were authorized to defend themselves against search, restraint, or seizure, on the part of any armed vessel sailing under French colors, and to retake any vessel captured by any vessel acting under authority from the French Republic. But there was a proviso couched in the studiously restrained language of the entire series of legislation, directing that whenever the Govern-

⁶ 1 Statutes at Large, 561.

⁷ 1 Statutes at Large, 565.

⁸ 1 Statutes at Large, 572.

ment of France should disavow and cease its lawless depredations, the President should thereafter instruct the commanders and crews of American merchantmen to submit to any regular search on their part.

On the 7th of July, 1798,⁹ the treaties between the United States and France were declared to have been so repeatedly violated on the part of the French Government and that government was declared to be pursuing a system of such predatory violence against the United States that our government was exonerated from the stipulations of those treaties and they should not thenceforth be regarded as legally obligatory on the government or the citizens of the United States.

On the 9th of July, 1798,¹⁰ the public armed vessels of the United States were, if instructed by the President, to have authority to seize any armed French vessel, and the President was also authorized to grant special commissions to the owners of private armed vessels for subduing, seizing and capturing any armed French vessel, and for the recapture of American property captured by such French vessels, though here again the legislation is hedged around with restrictions showing a high degree of self-restraint on the part of the legislators of the period in view of the severe provocation to which we were subjected.

The legislation of the time is also full of provisions for strengthening our naval armament in preparation for the expected outbreak or complete breach with France. Indeed, the very existence of the Navy Department as a separate executive department dates from this eventful period.¹¹

Washington was, in anticipation of more vigorous steps being required, commissioned in his retirement at Mount Vernon as Lieutenant-General,¹² and held his commission under that act to the date of his death the following year, though events never came to a point requiring him actively to assume the command legally conferred upon him.

⁹ 1 Statutes at Large, 578.

¹⁰ 1 Statutes at Large, 578.

¹¹ April 30, 1798, 1 Statutes at Large, 553.

¹² Act May 28, 1798, sec. 5, 1 Statutes at Large, 558.

We were thus brought to the very brink of war with France and, indeed, to a qualified state of hostility. At no time, however, did the French prize tribunals, anxious as they were to seize upon every excuse for the condemnation of American property, base their acts in doing so upon the ground of the existence of war between France and the United States, a ground which, had it existed, would have been a conclusive justification for their action, and which would, indeed, have made it unnecessary to assign any other. And in all the negotiations with France in which these claims were pressed, she never set up as a defense the existence of a state of war.

From a complete break with France we were saved by the statesmanship of the negotiators of the treaty of September 30, 1800. These men, sent out by President John Adams, were headed by Oliver Ellsworth, Chief Justice of the United States. When they arrived in France, they found the Directory no longer in power, but the government practically in the hands of Napoleon under the title of First Consul.

After many months of negotiation, in which the French negotiators urged the continued force and obligation of our guaranty of the American possessions of France, a treaty was finally concluded. The difficulties in the negotiation of this treaty which from time to time threatened to break off the negotiations, were the insistence on the one hand by France upon our making good our perpetual guaranty of France in her American possessions, and on the other hand the equal urgency of our own envoys in behalf of the claims of American merchantmen for indemnity from the Government of France for the seizure of their vessels and cargoes.

The validity of these mutual claims was fully admitted on both sides. Our envoys offered a large sum in cash to get rid of our national obligations to France, but insisted upon a claims commission to determine the claims of our citizens against France for the spoliation. France admitted the unjustifiableness of the seizures made by her men-of-war and privateers, and was perfectly ready to make full reparation if we had agreed to make good our treaty obligations for the guaranty of her American possessions and for the exclusive port privileges.

The result of the negotiations was in effect a surrender — in the end, an absolute and express surrender — of these mutual claims on both sides. Article 2, as it appeared in this treaty of 1800 when signed by the respective plenipotentiaries of the two nations, read as follows: ¹³

The Ministers Plenipotentiary of the two parties not being able to agree at present respecting the treaty of alliance of 6th February, 1778, the treaty of amity and commerce of the same date, and the convention of 14th of November, 1788, nor upon the indemnities mutually due or claimed, the parties will negotiate further on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and convention shall have no operation, and the relations of the two countries shall be regulated as follows:

Had this article been agreed to by the two nations as thus signed by the plenipotentiaries, it would have still left open both the national claims of France against us and the individual claims of our ship owners and merchants against France. But at the end of this treaty as officially published ¹⁴ the sequel appears as follows:

The Senate of the United States did, by their resolution on the 3d day of February, 1801, consent to and advise the ratification of the convention: *Provided*, The second article be expunged, and that the following article be added or inserted: "It is agreed that the present convention shall be in force for the term of eight years from the time of the exchange of the ratifications."

Bonaparte, First Consul, in the name of the French people, consented on the 31st July, 1801, "to accept, ratify, and confirm the above convention, with the addition importing that the convention shall be in force for the space of eight years, and with the retrenchment of the second article: *Provided*, That by this retrenchment the two States renounce the respective pretensions, which are the object of the said article."

These ratifications, having been exchanged at Paris on the 31st of July, 1801, were again submitted to the Senate of the United States, which, on the 19th of December, 1801, declared that it considered the convention fully ratified, and returned it to the President for promulgation.

Thus, the two countries renounced as against each other their respective claims. The claim of France against us was a national one.

¹³ Public Treaties of the United States, 1875, p. 225.

¹⁴ Public Treaties of the United States, 1875, p. 232.

It consisted in the obligation assumed by us and the execution of which was insisted upon by France to guarantee her forever in the possession of her American colonies — an obligation assumed by us in return for her aid at the time of our utmost national peril. This guaranty we had already violated.

So, too, with the exclusive port privileges which we had guaranteed to France in time of war, and which we had by the Jay treaty of 1794 transferred to Great Britain, France had a national claim against us based upon this violation, although to have re-established the provisions of the French treaty of 1778 in this respect would have involved us in difficulties with Great Britain. Whether these violations of our treaty obligations were, in the forum of international morals, justifiable, is a question to which various answers might be given, and which the Court of Claims did not find itself obliged to answer. As a question of international law, however, there can be no doubt. The treaty obligations were there. We had utterly disregarded them, and for that disregard France had as good a claim against us as we had against her for her many unjustifiable captures of our merchantmen. To have kept good our obligations with France would have involved us in a second war with Great Britain, for which we were not ready, and in which the people of the United States would have felt no national interest under the friendly relations which we had then resumed with the English. To take up again the cause of France and to reassume our guaranty of her American colonies and our promise of exclusive port privileges to her in time of war would have meant in 1800 to tie ourselves up at the dawn of the nineteenth century with the struggles and quarrels of Europe, from which it was our greatest blessing to have cut loose when we declared ourselves independent.

A high order of statesmanship was shown by President John Adams, his cabinet and his negotiators of this treaty when they thereby obtained the release of our government from this onerous and inconvenient obligation.

The American claims against France were of a totally different character. They were presented, it is true, by the nation, as all individual claims against a foreign government must be presented

by the nation and not by the individual himself. But ultimately they were claims of the individual owners of vessels and cargoes captured and condemned with or without legal process by the French. They were based upon the long series of spoliations committed by the public cruisers and private-armed vessels under commissions from the French Government against our merchantmen, vessels peaceably pursuing their course of lawful trade between 1793 and 1800. Thus, the rights of American ship owners and merchants were traded away in return for a great national advantage.

They thereafter had no redress against France and naturally looked to their own government for indemnity for their losses from which indemnity France had been forever released. From that time for a period of eighty-five years those claims were actively pressed, first by the original claimants, and afterwards by their descendants. They were championed by some of the greatest names in American public life.

Chief Justice Marshall especially expressed himself as impressed with their equity and justice. He said that:

Having been connected with the events of the period and conversant with the circumstances under which the claims arose, he was, from his own knowledge, satisfied that there was the strongest obligation on the Government to compensate the sufferers by the French spoliations.¹⁵

In 1826, Henry Clay, then Secretary of State, transmitted to the Senate in pursuance of a resolution, all the diplomatic correspondence which had given rise to these claims, and it was printed as Senate Document No. 102, 19th Cong. 1st Sess.

It is significant that from that time until 1885, when the act was passed referring these claims to the Court of Claims, no adverse report was ever made on these claims in either House of Congress. The act which thus became a law in 1885 was the third to pass both Houses of Congress. The first was vetoed by President Polk on account of the condition of the Treasury, which he deemed "not justifying the expenditure of the money at that time," and the second by President Pierce on grounds going to the origin of the claims.

¹⁵ Clayton's Speech, 1846.

The third, which was signed by President Arthur, gave the Court of Claims power and jurisdiction to examine into the validity of the claims, their present ownership, and all considerations affecting their validity, merits, and the amounts, and to report to Congress its conclusions of fact and law with regard to each claim.¹⁶

The Court of Claims is a tribunal originally established by Act of February 24, 1855,¹⁷ "for the investigation of claims against the United States." Story, in his work on the Constitution, Sec. 1678, intimates a strong opinion that it is the duty of Congress to establish a tribunal in which the government may be sued. This duty was neglected until long after Story's death. Even after the court was established, it was prohibited from exercising jurisdiction over any claims "growing out of or dependent on any treaty stipulation entered into with foreign nations."¹⁸

Long after the establishment of the court, Chief Justice Chase, for the Supreme Court, said:

It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfil its obligations.¹⁹

And still later:

By establishing this court, the United States created a tribunal to determine the right to receive moneys due by the government.²⁰

The general provisions of law relating to the Court of Claims are now embodied in Chapter 7 of the Judicial Code of March 3, 1911.

The general jurisdiction of the court is mainly exercised in cases arising out of contracts with the government and in suits involving the question of pay or emoluments of officers.

Under the ordinary procedure of that court, it enters final judgments against the United States from which appeals lie to the Su-

¹⁶ 23 Statutes at Large, 283.

¹⁷ 10 Statutes at Large, 612.

¹⁸ 12 Statutes at Large, 767.

¹⁹ *United States v. Klein*, 13 Wall. 128, 144.

²⁰ *United States v. Borchertling*, 185 U. S. 223, 234.

preme Court of the United States.²¹ But “the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for new trial.”²²

In these French spoliation claims, however, provision was made by the Act of 1885 that the decision of the court should not take the form of a judgment, but that its conclusions of fact and law should be reported to Congress as advisory for future action.

In the first cases which came before the Court of Claims under this act it was maintained on behalf of the claimants that the terms of the act constituted a pre-judgment on the part of Congress of the validity of the claims as a class, leaving only to the court the examination of the particular facts and circumstances tending to bring each claim within the class. This view the court refused to adopt and held on the contrary that it was the intention of Congress to submit to the court the original and underlying question involving the validity of all the claims as a class.

It therefore entered into an exhaustive examination of all the facts of diplomatic history with regard to the relations of France and the United States at that day. The opinions in the initial cases were written by Judge John Davis, then fresh from a service of great brilliancy as Assistant Secretary of State, and constitute beyond all doubt the most complete examination which the general subject of these claims has ever received.

The principal defense of the United States was that France and the United States were at war during the time of these captures and that therefore the captures were justifiable as having been made by a belligerent against the private property of another belligerent found on the high seas. The court made an examination of the entire statutory history of the period, as well as of the judicial and diplomatic acts of each government bearing on the question.

The conclusion reached was that while the relations had become very strained and there was even a partial state of hostilities, there had not been a state of war between France and the United States at

²¹ Judicial Code, Secs. 242, 243.

²² *United States v. O'Grady*, 22 Wall. 641, 648.

any time. The legislation of the day, as has been shown by the brief summary given of it earlier in this article, was marked by studious restraint, and nowhere authorized anything going beyond defensive measures against the arbitrary and unlawful depredations of French cruisers and privateers upon American commerce.

The French tribunals, on the other hand, with all their desire to find every pretext for the condemnation of American vessels and cargoes, had never claimed that they had justification for so doing in the existence of a state of war between the two countries. And when the claims were presented and actively urged by our negotiators upon the French Government as proper subjects for treaty settlement, their validity was never questioned, but they were met by the assertion of equally valid national claims existing on the part of France against the United States.

The position of the two governments is also clearly stated in Senator Sumner's great report on these claims:

And now, when it is considered that Congress alone, under the Constitution, has the power to declare war; that it never made any declaration of war against France, and that throughout this whole period of trouble — in its whole series of acts — it expressly negated the fact of war, it is impossible to assert that, according to the understanding of our Government, war actually existed. What Congress did, and what it failed to do, testify alike.

But the declarations of the Executive are as explicit as the declarations of Congress. In the instructions to our plenipotentiaries at Paris, under date of October 22, 1799, the Secretary of State, after reciting the spoliations of France, says:

"This conduct of the French Republic would well have justified an immediate declaration of war on the part of the United States; but desirous of maintaining peace, and still willing to leave open the door of reconciliation with France, the United States contented themselves with preparations for defense and measures calculated to protect their commerce. (French Spoliations, 1826, p. 561.)"

And these plenipotentiaries declared to the French plenipotentiaries, under date of April 16, 1800, that "the act of Congress, far from contemplating a co-operation with the enemies of the Republic, did not even authorize reprisals upon merchantmen, but were restricted solely to giving safety to our own, till a moment should arrive when their sufferings could be heard and redressed." (*Ibid.*, p. 583.) Again, in the instructions to our Minister in England, under date of September 20, 1800, the Secretary of State, who was none other than John Marshall, says:

"The aggressions of one and sometimes of another belligerent power have forced us to contemplate and to prepare for war as a probable event. (*Ibid.*, p. 452.)"

In the face of such declarations who can say that war existed? ²³

And again:

Already, at an earlier day, Talleyrand, as minister of foreign relations, had written, under date of August 28, 1798:

"France has a double motive, as a Nation and as a Republic, not to expose to any hazard the present existence of the United States. Therefore it never thought of making war against them; and every contrary supposition is an insult to common sense." (*Ibid.*, p. 649.)

When the convention in its final form was laid before the legislative assembly of France, one of the French plenipotentiaries charged with its vindication announced in a speech, November 26, 1801, that "it had terminated the misunderstanding between France and America," which, he said, had become such "that the reconciliation should be hastened if it was desired that it should not become very difficult." A report was also made to the legislative assembly by M. Adet, formerly French minister to the United States, in which it is declared:

"There had not been any declaration of war. Commissions granted by the President to attack the armed vessels of France are not to be regarded as a declaration of war. The will of the President does not suffice to put America in a state of war. It requires a positive declaration of Congress to this effect. None has ever existed." (Code Diplomatique, par Portiez, tom. 1, pp. 39-57.)

And these legislative documents, so positive in character, are introduced by the learned editor in words which fitly characterize the international relations to which they refer when he says that "they exhibit the causes which ruffled the harmony of the two States." True enough. The harmony of the two States was ruffled, but war did not exist.²⁴

And many years after the first decisions of the Court of Claims, that master of the general subject of governmental liability, Chief Justice Nott, said in regard to the subject of the existence of war:

* * * that no war existed which released France from her international responsibilities, or which authorized her to destroy American commerce. The question has been exhaustively argued and exhaustively examined, and all the information and learning which it is susceptible

²³ Compilation of Reports of Committee on Foreign Relations, U. S. Senate, Vol. I, pp. 305, 306.

²⁴ Compilation of Reports of Committee on Foreign Relations, U. S. Senate, Vol. I, p. 306.

of receiving will be found embodied in the opinions in the cases of *Gray* (21 C. Cls. R. 340), *Cushing* (22 id. 1), and the *John* (22 id. 408). In a few words it may be said that the United States never ceased to hold France pecuniarily responsible for the acts of her cruisers and privateers, and that France never denied her liability for unjustifiable seizures and condemnations. Moreover, France never interposed the defense of belligerent rights, but, on the contrary, again and again reiterated her willingness to discharge her treaty and international obligations whenever the United States would discharge theirs. A defense which France could not now and did not then set up, the United States cannot set up. Where France claimed no exemption the United States can claim none for her; where they can claim no exemption for France, they can set up none for themselves. The question of liability to be determined is the liability of France.²⁵

There was thus a complete chain of evidence that neither France nor the United States regarded herself as at war with the other during this period, and that both nations regarded the claims of American citizens against France for the spoliation of their property as well founded. Thus, the claims having been traded off by the American negotiators of the treaty in return for our release from national claims of the most embarrassing character on the part of France against us, the court held that the case was covered by the general principle of international law, that when a claim of a citizen against a foreign government is surrendered or relinquished by that government for its own advantage, it is bound to compensate him for the sacrifice thus exacted of him for the national advantage.

Lord Truro's view, expressed in the House of Lords, was cited:

That if the subject of a country is spoliated by a foreign Government he is entitled to redress through the means of his own Government. But if from weakness, timidity, or any other cause on the part of his own Government no redress is obtained from the foreign one, then he has a claim against his own country.²⁶

It was added:

The same position is sustained by that eminent writer upon the public law, Vattel, who held that while the sovereign may dispose of either the person or the property of a subject by treaty with a foreign power, still,

²⁵ *Ship Concord*, 35 C. Cls. 432, 443, 444.

²⁶ *De Bode v. The Queen*, 3 Clarke's House of Lords, p. 464.

“as it is for the public advantage that he thus disposes of them, the State is bound to indemnify the citizens who are sufferers by the transaction.” (Book 4, chap. 2.)

Napoleon, from his retirement in St. Helena, testified that by the suppression of the second article of the treaty of 1800 the privileges which France had possessed by the treaty of 1778 were ended, and the “just claims which America might have made for injuries done in time of peace” were annulled, adding that this was exactly what he had proposed to himself in fixing these two points “as equi-ponderating each other.” (Gourgaud, *Memoirs*, vol. 2, p. 129.)

Finally, Senator Livingston, familiar with the whole subject as a contemporary, in his report upon it to the Senate, said:

“The committee think it sufficiently shown that the claim for indemnities was surrendered as an equivalent for the discharge of the United States from its heavy national obligations, and for the damages that were due for their preceding nonperformance of them. If so, can there be a doubt, independent of the constitutional provision, that the sufferers are entitled to indemnity? Under that provision, is not this right converted into one that we are under the most solemn obligations to satisfy? To lessen the public expenditure is a great legislative duty; to lessen it at the expense of justice, public faith, and constitutional right would be a crime. Conceiving that all these require that relief should be granted to the petitioners, they beg leave to bring in a bill for that purpose.”²⁷

The same principle is expressed in the Fifth Amendment to the Constitution, “Nor shall private property be taken for public use without just compensation.”

These opinions of the Court of Claims were made the subject of a review by Sir John Westlake in the *Revue de Droit International*, Brussels, Vol. 18, p. 543. This very competent critic, looking at the question from an impartial distance, treats the decision of the Court of Claims as being so clearly right as hardly to admit of question. He says:

The pamphlet before us contains the advice given by the Court of Claims, and it is hardly necessary to say that this advice is favorable to the claimants.²⁸

²⁷ *Gray, Adm'r v. United States*, 21 C. Cls. 340, 391.

²⁸ “La brochure dont nous nous occupons renferme les avis donnés par la cour des griefs, et il est presque inutile de dire que ces avis sont favorables aux plaignants.”

And he concludes :

Let us hope that Congress will conform to the advice which has been given to it, and will thus bring to an end a controversy, interesting rather on account of its origin and its extraordinary duration than by reason of any difficulties which it presents.²⁹

The general question of the liability of the United States for these French spoliations has just been re-examined by the Court of Claims, the entire membership of the court having changed since the initial decisions of 1886.

The court in 1911, by Judge Howry, thus recapitulated and re-affirmed its conclusion of twenty-five years earlier :

Beginning with the reports of Mr. Pickering (who was Secretary of State under the administrations of both President Washington and President Adams) and ending with the approval of the act of 1885 by President Arthur, the discussions related to indemnity for property spoliated and not to diplomatic claims for injuries done to persons sailing the seas. Chief Justice Marshall, while contending that there was the strongest obligation on our Government to compensate, restricted the contention to compensation for those whose vessels and cargoes had been despoiled. Clayton's speech, 1846. Mr. Clay rested his contention for payment upon the rule of equity "furnished by our Constitution," which provides that private property shall not be taken for public use without just compensation — making his contention so applicable as to entitle the injured citizen to consider his own country a substitute for the foreign power. The Meade case in 1821. Mr. Clay's report was either preceded or followed by forty-four other reports generally favorable for indemnity for property only. Many eminent in our public life concurred, including President Madison, Edward Livingston, Clinton, Everett, Webster, Cushing, Choate, Sumner. This court has said, however, that opponents were not wanting, among the most eminent of whom was Forsyth, Calhoun, Silas Wright, Benton, President Polk, and President Pierce. In the three unfavorable reports the objectors put their opposition to indemnities of any kind.

The act for the payment of these claims discloses a majority of many more than two to one of those voting in the House of Representatives. Those supporting the measure include names from all sections of the country. Among many eminent in their day and time but no longer living may be mentioned Culberson, Breckinridge, Broadhead, Dingley,

²⁹ "Espérons que le congrès se ralliera à l'avis qui lui est donné, et terminera ainsi une controverse qui offre de l'intérêt plus à cause de son origine et de sa durée extraordinaire qu'à cause des difficultés qu'elle présente."

Abram S. Hewitt, Oates, Thos. B. Reed, W. L. Wilson, and John Randolph Tucker. The measure passed the Senate without a record vote. 16 Cong. Rec., 48th Cong.

A cash valuation had been put upon the claims of our merchantmen and vessel owners of a large sum. But later, France admitted a valuation of property spoliated of ten millions of francs. At the same time France was contending that by reason of the abrogation of our treaty with that Government, France had sustained damages for a sum so great money could not compensate. She conceded that money should be paid for the destruction of the property rights of our citizens. By the settlement between the two countries the United States surrendered the diplomatic claims of our citizens for the relinquishment by France of that country's national obligations against us. * * *

The spoliation claims as a class were valid obligations from France to the United States, and our Government surrendered them to France for a valuable consideration benefitting the Nation, and this use of the claims raised an obligation founded upon right.³⁰

In the allowances made by the Court of Claims no interest has been included. Senator Sumner, in his great report on these claims, said: "If interest be due on any national debt, it is difficult to see why it is not due here."³¹

Notwithstanding this statement of the national liability, interest has never even been asked for, nor has it been in fact allowed or paid.

The tenacity with which the claims, as well as the documents relating thereto, have been held in the hands of the families of the original owners is alluded to in an opinion of Chief Justice Richardson in the Court of Claims in the case of the Schooner *Industry*, 26 C. Cls. 249, 251:

It has been declared and often reiterated that these claims had largely ceased to be owned by the families of the actual losers, and had passed into the hands of speculators, who had purchased them at great discount and were besieging Congress by the aid of claim agents and others to pay the full amount of the original losses, by which great profits would accrue to them. Although emphatically denied, that allegation had come to be, if not believed, at least very much feared.

It was that idea which no doubt led to the insertion of the provision about assignees in the following section of the act of 1885, January 20, chap. 25 (23 Stat. L. 283):

³⁰ Brigs *Fanny and Hope*, 46 C. Cls. 214, 223, 224.

³¹ Senator Sumner's report on French spoliation claims, Compilation of Reports of Committee on Foreign Relations, U. S. Senate, Vol. I, p. 319.

“That the court shall examine and determine the validity and amount of all the claims, included within the description above mentioned, together with their present ownership, and, *if by assignee the date of the assignment, with the consideration paid therefor.*”

The same idea is again manifest in the proviso of the appropriation act making the first awards, and under which the present motion for a certificate is made.

It is due to truth and the facts of history to say that in all the cases already tried in this court, we find the claims to have been retained, with the papers, documents, and other evidence, in the numerous families of the original losers, with uncommon tenacity, still subject to distribution as assets of those who first made the losses.

The principles on which the court proceeded in the details of its allowances will be the subject of a later article.

GEORGE A. KING.